

## Case Note

Case note **Germany**

Case No. **GmS-OGb 1/98**

Name and level of court **Gemeinsamer Senat der obersten Gerichtshöfe des Bundes (Joint Senate of the Federal High Courts)**

Members of court **President: Dr. Franßen, Dr. Geiß, Dr. Ebling, v. Wulffen, Dr. Wißmann, Nobbe, Dr. Hohrmann, Dr. Siol**

Date of verdict **Order from 5 April 2000**

Available in electronic format at <http://www.jurpc.de/rechtspr/20000160.htm>

### Brief facts

The Joint Senate of the Federal High Courts had to decide on the question whether or not a facsimile sent directly from a computer (Computerfax) with a scanned signature, complies with the requirements of written form for formal court pleadings. According to various rules of German procedural law, formal court pleadings have to be personally signed. Several Federal High Courts have decided on this previously.<sup>1</sup> The Federal High Court of Justice submitted the case to the Joint Senate, because it intended to dissent from these decisions.

### Decision

The Joint Senate decided that it is in fact sufficient under German procedural law to transfer pleadings electronically to the facsimile machine of the courts if they are “signed” with a scanned signature or if they contain a remark stating that personally signing had not been possible due to the chosen way of the transmission.

### The Reasoning of the Court

The Joint Senate argued that formal requirements of procedural law do not serve as an end in themselves. The sole purpose of the requirement for formal court pleadings to be in writing is to identify the sender and to ensure that the document was sent with his or her knowledge and intention. The court argued further that it is in accordance with the development of many years of legal practice to admit the electronic transfer of pleadings with scanned signatures to the courts’ facsimile machines. This, the court continued, is a way to adapt to technological progress by means

of the use of telecommunication. The members of the court went on to say that the purpose of the written form is met where the personal signature of the sender is scanned and placed in the document, and that it is even met where the text contains a notice that the originator could not personally sign because of the chosen way of transmission. The court concluded that under normal circumstances, the sender’s intention to send the pleading to the court could not seriously be doubted.

### Comment

Even though this is an older decision, it is still of importance for the legal practice in Germany.<sup>2</sup> Sending formal written pleadings to the court by facsimile is a common practice. At the time of this judgement, the first Digital Signature Act<sup>3</sup> had already been passed. However, there were no regulations in place such as the rule that equated hand-written signatures and Digital Signatures, as set out in § 126a BGB (Civil Code) for civil declarations. This rule was introduced a year later.<sup>4</sup> Nevertheless, the difference between a Computerfax and an e-mail or an electronic document concerning the signature seems to be quite small. The use of qualified digital signatures for electronic documents might be a much safer way to ensure the integrity, authenticity and the intention of the act of sending: there is an important chance that it is the safer way in comparison to a facsimile sent by computer. The court of lower instance had already seen this potential conflict of formal requirements and intended to insist on more restrictive requirements.<sup>5</sup> But the regulations of the civil

<sup>1</sup> Federal Social Court, Beschluß vom 15.10.1996 - 14 BEg 9/96; Federal Administrative Court, Beschluss vom 19.12.1994 - 5 B 79/94.

<sup>2</sup> The Federal Constitutional Court affirmed it in 2002. (BVerfG, Beschluss v. 4.7.2002 - 2 BvR 2168/00.

<sup>3</sup> Art. 3 IuKDG BGBl. I S. 1870 vom 22.7.1997 (Federal Law Gazette); available in electronic format at <http://www.iuscomp.org/gla/>.

<sup>4</sup> Law adapting formal regulations of private law and other regulations to modern legal relations, BGBl. I S. 1542 vom 18.7.2001 (Federal Law Gazette Part I page 1542), entry into force 19 July 2001, available in the German language in electronic format at <http://217.160.60.235/BGBl/bgb11f/b101035f.pdf>.

<sup>5</sup> OLG Karlsruhe, Urteil vom 14.11.1997 - 14 U 202/96.

procedural law, which entered into force in 2001, do not require a qualified electronic signature: § 130a sec. 1 ZPO (Civil procedure code)<sup>6</sup> stipulates only that electronically transmitted written pleadings “should” use a qualified electronic signature. Therefore, it is not necessary to use the qualified electronic signature under civil procedure law, contrary to the legal status for the civil law, where only qualified electronic signatures can replace written form. The judgement has even influenced the process of legislation in this point. Like the Joint Senate, the legislator did not consider the risks of manipulation to be substantive. It remains to be seen whether and how this concurrence will influence the implementation and acceptance of electronic signature used for communication with jurisdictions.

<sup>6</sup> Only available in the German language in electronic format at <http://www.gesetze-im-internet.de/bundesrecht/zpo/index.html>.